No. 2407

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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STATEMENT OF THE CASE

This was an action for personal injuries resulting to defendant in error while assisting in constructing a manhole on one of the public streets of the city of Seattle from being struck by one of the

street cars of plaintiff in error. Defendant in error was the plaintiff and plaintiff in error the defendant in the court below, and to save confusion the parties will be referred to hereafter as plaintiff and defendant instead of as defendant in error and plaintiff in error.

The complaint in substance alleges that on January 23, 1913, at about 10:00 o'clock A. M., while plaintiff was assisting in constructing a water gate or manhole in connection with an underground water pipe on 14th Avenue N. E. in the City of Seattle, near its intersection with 55th Street, in a circular excavation six feet in diameter and four feet deep, and while his attention was fixed upon his work of passing bricks to the mason constructing said manhole, defendant caused one of its electric street cars operated upon said 14th Avenue N. E., the track of which extended within one foot of said excavation, to run into and strike plaintiff, causing the injuries for which recovery was sought. The negligence which is alleged to have caused plaintiff's injuries is (1) failure to give plaintiff proper warning of the approach of the street car; and (2) the operation of said car at 15 miles per hour when the speed was limited by ordinance to 12 miles per hour. (Record, pp. 2-6).

Defendant's answer, while admitting that a city ordinance limited the speed of street cars to 12 miles per hour at the point of the accident, in substance denies that said collision was due to any

negligence on the part of defendant. As a first affirmative defense it is alleged that whatever injuries plaintiff received were caused and contributed to by his own careless acts and negligence. As a second affirmative defense it is alleged:

> "That the plaintiff at the time and place in question was employed by a contractor of and with the City of Seattle in the performance of extra-hazardous work, to-wit, in the construction of a manhole in and upon one of the streets of said city, and that the work in which the plaintiff was engaged at the time and place in question was of the extra-hazardous kind covered and included under Chapter 74, Laws of 1911 of the State of Washington, page 345, relating to compensation of injured workmen; and that whatever injuries, if any, plaintiff received, were received at a time when he was engaged in the employment of an employer carrying on and conducting one of the industries scheduled and classified under such law, and at the plant of such employer, and subject to the provisions of such law; and that, thereafter, to-wit, on the 25th day of January, 1913, the plaintiff herein caused to be filed a Workman's Claim for Compensation with the Industrial Insurance Commission of the State of Washington being Claim No. 16,531; and thereafter, the said Industrial Insurance Commission of the State of Washington awarded the plaintiff herein compensation

for the month ending February 23, 1913, of $30.00, and also for the month ending March 23, 1913, of $30.00." (Record, pp. 7-10).

Plaintiff's reply puts in issue defendant's plea of contributory negligence and with respect to the second affirmative defense plaintiff admits that at the time of the accident he was employed by a contractor of the City of Seattle in the constructing of a manhole but denies that his injuries were inflicted "at the plant" of his employer or through the negligence of his employer and denies that his injuries were subject to compensation under the Workmen's Compensation Act and alleges that his injuries were inflicted by a person not in the same employment as himself and away from the plant of his employer, and that if they were subject to compensation under the act, plaintiff was entitled to elect and had elected not to take under the Act but to rely upon his action at law and had given due notice of said election. (Record, pp. 12-13).

The cause was tried before a jury on January 8, 1914. Upon plaintiff resting his case defendant moved for judgment of non-suit for the reasons: (1) that plaintiff had failed to establish any cause of action against defendant; (2) that plaintiff's evidence showed as a matter of law that he was guilty of contributory negligence; and (3) that under the evidence plaintiff could recover only under the Workmen's Compensation Act. This motion the court denied. (Record, pp. 143-145).

Defendant then submitted its evidence and after all the evidence was in defendant challenged the sufficiency of the evidence to sustain a verdict for plaintiff, basing its motion upon the same grounds as those for which he had moved for a non-suit. This motion was likewise denied. (Record, pp. 186-187).

On January 9, 1914, the jury returned a verdict for the plaintiff for $1470.00. (Record, p. 14). Before the case was submitted to the jury defendant duly excepted to the giving of certain instructions and the refusal of the court to give certain instructions, which will be more fully considered later. On January 13, 1914, judgment on the verdict was entered. (Record, pp. 15-16). On January 29, 1914, defendant petitioned the court for a new trial (Record, pp. 17-28), which motion was on March 18, 1914, denied. (Record, p. 29). From the judgment entered upon the verdict this writ of error is prosecuted. (Record, pp. 225-226).

SPECIFICATIONS OF ERROR

I.

The court erred in denying defendant's motion for judgment of non-suit. (Record, pp. 143-145).

II.

The court erred in overruling defendant's challenge to the sufficiency of the evidence to sustain

a verdict for plaintiff and request that the court instruct the jury to return a verdict for defendant. (Record, pp. 186-187).

III.

The court erred in instructing the jury as follows:

> "You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, as outlined and defined in these instructions." (Record, pp. 205-206).

IV.

The court erred in refusing to give the following instruction duly requested by defendant:

> "You are further instructed that it was the duty of the plaintiff to use his senses, his eyes

and his cars, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant." (Record, p. 203).

V.

The court erred in instructing the jury as follows:

"You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened." (Record, p. 206).

ARGUMENT

SPECIFICATIONS OF ERROR NOS. I AND II

Defendant Entitled to a Directed Verdict

An examination of the record will, we believe, convince the court that if the record reveals any negligence on the part of defendant, such negligence was not shown to be the proximate cause of plaintiff's injuries.

Except as otherwise indicated the following facts were uncontroverted: 14th Avenue N. E. at and near the point where it is intersected by 55th Street runs north and south. (Record, pp. 123-4). In the middle of the avenue at this point defendant, at the time of the accident, operated a double track electric street railway. (Record, p. 2). Northbound cars were operated upon the easterly (Record, pp. 60, 72) and southbound cars upon the westerly track. (Record, p. 72). At the time of the alleged accident the west side of the street between the curb and westerly track was completely paved with asphalt. (Record, pp. 56, 75-6, 123-4, 179-180). Between the easterly rail and the easterly curb the street was excavated for the concrete base a depth of about a foot (Record, p. 179) but the concrete and asphalt had not yet been laid. (Record, pp. 75-6, 116, 123-4, 179-180). At the time of the accident Krough and Jesson, city contractors, by whom

plaintiff had been employed for several months (Record, pp. 70-71) and was then employed (Record, pp. 70-1, 136-7), were constructing a water gate or manhole from the surface of the street to the water pipes of the city water system which were laid underground. (Record, pp. 54-5). For the purpose of constructing this manhole a circular excavation had been made in the unpaved portion of the street, about six feet in diameter (Record, pp. 55-6, 122-3, 183-4) and which at the time of the accident was about three feet deep. (Record, pp. 55-6, 117). This excavation was on the easterly side of the avenue near its intersection with 55th Street. The most westerly edge of the excavation was about two feet from the easterly rail of the street car track (Record, pp. 57-8, 127-8) and the north edge of the excavation was approximately on the south marginal line of where the south walk on 55th Street would be had it been extended from the easterly curb to the easterly rail of the street railway track. The center of this excavation was four feet, four and a half inches from the easterly rail of the street railway track. (Record, p. 183). The dirt from the excavation was thrown upon the southerly side of the hole. (Record, pp. 59-60). For the convenience of pedestrians crossing 14th Avenue N. E., on the southerly side of 55th Street, a temporary sidewalk had been constructed from the easterly curb to the easterly rail by laying short boards or planks side by side in a north and south direction (Record, p. 180)

from the easterly curb to the easterly rail of the east track. (Record, pp. 56-7, 76-78, 116-7). These short planks were not laid upon sleepers (Record, pp. 116, 181) but were laid directly upon the dirt where the street had been excavated preparatory to being paved. Where this temporary sidewalk passed the excavation for the manhole these short planks lapped over the hole or excavation a short distance (Record, pp. 56-7, 115-116, 180) and the evidence tended to show that the constant use of these planks and the fact that they were unsupported by sleepers had caused them to tend to teeter or tip if a person should stand on the ends of the planks next to the hole. (Record, p. 180).

The manhole was being constructed with brick and mortar. (Record, pp. 57-8). A Mr. Kroon was in the excavation constructing the manhole (Record, pp. 57-8, 113-4) and it was plaintiff's duty to wheel the brick in a wheel-barrow from the place where the bricks for this work were piled up on 55th Street east of 14th Avenue N. E., and dump them near the hole, and then hand the brick down to the mason constructing the manhole as he needed them. (Record, pp. 73-4, 137-8). The most natural place for the plaintiff to stand in handing these brick down to the mason was directly north of the center of the hole, standing on the temporary plank crosswalk. (Record, p. 140). Plaintiff never stood between the track and the excavation while handing brick to the mason. (Record, pp. 115-116). The brick were handed to the mason

on the same side of the track upon which they were dumped and there was no occasion for plaintiff to cross the track for material. (Record, pp. 140-1). Indeed the record fails to show that there was any necessity whatever for the plaintiff, in discharging his duties, either to cross the track, or to go sufficiently near the track to be struck by a passing car. (Record, pp. 73-4, 140-1).

The accident occurred at 10.20 in the forenoon. (Record, pp. 70-1). Plaintiff, a man of forty-two years (Record, p. 54) had wheeled a load of brick to the excavation for the manhole and was standing north of the center of the hole (Record, pp. 78, 119-120) and at a point where a car approaching from the south upon the easterly track could easily pass him (Record, pp. 119-120, 139-140, 171) and was about to hand brick which he had in his hand to the mason (Record, p 137) when he suddenly jumped upon the track when a car approaching from the south upon the easterly track (Record, p. 60) was not more than ten feet distant (Record, pp. 120-1, 124-5, 138-9, 170-1). The testimony introduced by both plaintiff and defendant tended to show that the reason plaintiff sprang upon the track was the fact that while he was in the act of handing the brick to the mason in the excavation one of the short pieces of plank or board forming the temporary crosswalk upon which he was standing flew up or teetered, and plaintiff, to save himself from falling into the excavation involuntarily sprang onto the track. (Record, pp.

78, 79, 137-8, 170-171). Although plaintiff himself testified that he was not accustomed to stand on the teetering ends of planks projecting over the hole to pass the brick down to the man, (Record, pp. 185-6), he admitted that this might have caused him to jump on the track. (Record, p. 79).

Since plaintiff was standing on the north side of the excavation, in handing the brick to the mason he must have been facing in a southerly direction. The car which injured him was approaching from the south down about a three per cent. grade (Record, pp. 126-7) and could have been seen by plaintiff had he looked for it at least six hundred feet. (Record, pp. 59-60, 126-7, 172-3). He testified, however, that he had not looked for a car from the time the car came in view until he was hit; that his mind was engrossed in his work; that he wasn't thinking about the car. (Record, p. 73). He did not hear the car approaching (Record, pp. 58-9) although there were no unusual noises to divert his attention. (Record, pp. 122-3, 173-4). He had been in the employ of Krough and Jesson between three and four months (Record, pp. 70-71) and had assisted in similar work on the same street, for a considerable time. (Record, pp. 71-2). During this time, plaintiff testified, cars had been operated quite frequently over that line. (Record, p. 72).

While the motorman of the car in question testified that prior to the accident the car was going about six or seven miles an hour and that he rang

his gong about 20 or 30 feet from where the workmen were working, (Record, pp. 170-1), there was other testimony which, for the purpose of this review, we will assume was sufficient to present a jury question, to the effect that the car was going as high as fifteen miles an hour and that the gong was not sounded until plaintiff jumped upon the track. As to the manner in which the accident occurred we quote the following from the record:

"Q. What misstep did you make; you stepped on the teetering board and that caused you to start to fall and you jumped on the track in front of the car just as the car came along. That is it, isn't it?

"A. Well, it might be it."

(Testimony of Plaintiff, Record, p. 79).

"Q. He was handing brick to you down in the hole?

"A. Yes, sir.

"Q. About how far was he from the track when he was standing there?

"A. Oh, about three feet or something like that. He stand about in the center.

"Q. He was standing about three feet from the track so if he remained standing there the car would have gone by and not hit him?

"A. I guess so.

"Q. If he had not stepped on the track the car would not have hit him?

"A. No.

"Q. You heard the bell of the car ring?

"A. Yes.

"Q. And you saw him step on the track?

"A. He stepped on the track before I heard the bell.

"Q. Now, did you see what caused him to step on the track?

"A. What?

"Q. What did he do that caused him to fall over on the track; what did Schlief do that caused him to fall over on the track?

"A. He stepped over on the track.

"Q. What caused him?

"A. He stepped on the end of the plank and the plank jumped—he jumped right up on the track, so he don't fall in the hole.

* * * * * *

"Q. When he stepped on the teetering board and jumped on the track you heard the bell?

"A. Yes.

"Q. And you looked and the car was right there?

"A. Yes.

"Well, then, within three or four feet of him?

"A. Yes, at the time when I saw the car he was not more than three or four feet ahead of the car."

(Testimony of John Kroon on behalf of Plaintiff, Record, pp. 120-1).

Plaintiff's witness, Geo. Kumpf, did not see plaintiff step on the track, but first saw him on the track between five and ten feet ahead of the car. (Record, pp. 124-5). Other witnesses testified:

"Q. Did he still have brick within reach to pass down?

"A. The brick was laying right outside of the hole there. There was a plank laying across the edge of the hole for the men to step on so he could hand down the brick and mortar and he had to step off of that plank to take the brick and he was in the act—he had the brick in his hands and was going to turn around and hand them down in the hole as near as I could see, and he lifted his right foot up there to step on that plank there and somehow or other he made a misstep and involuntarily he stepped out on the track; stepped right over in front of the track—I was standing on the sidewalk right there and as he stepped over there I glanced down the track and there was the car within probably 12 feet.

* * * * * *

"Q. And the fender projects three or four feet in front of the car?

"A. Yes, sir.

"Q. That must have been within four to six feet of him?

"A. Yes, sir.

(Testimony of plaintiff's witness, Mr. Krogh, Record, pp. 137-8).

"Q. Now, Mr. Nelson, you were there in charge of the car. Tell the jury how this accident happened.

"A. Well, I was going down 14th Avenue Northeast and I was going about—I was going about 6 or 7 miles an hour and I rang my gong about 20 or 30 feet from where these workmen were working and as I got about 5 feet from this manhole, this man stepped on a loose plank and fell or maybe jumped, like he was trying to get out of my way and fell right on the middle of the track.

"Q. If he had remained where he was, would your car have gone past without hitting him?

"A. Yes, sir.

(Testimony of the motorman, Record, p. 171).

This is all the testimony in the record as to how the accident happened, and we submit that it was insufficient to sustain a recovery against the defendant for the following reasons:

(1) The evidence failed to show that the speed of the car was the proximate cause of plaintiff's injury;

(2) Assuming that plaintiff's act in jumping in front of the car was involuntary, the failure of the motorman to sound the gong would not have avoided the accident; and

(3) Assuming that plaintiff deliberately jumped in front of the car, from a place of safety, he was guilty of such contributory negligence as to bar his recovery.

Speed of Car Not Proximate Cause of Accident.

While it was admitted by the pleadings that an ordinance limited the speed of cars at the point in question to twelve miles per hour, there was absolutely no evidence in the record that a car going at twelve miles an hour or even less could have been stopped within ten feet, the distance of the car when plaintiff jumped in front of it, nor was it shown that had the car been going at a more modest speed plaintiff would have had time to leave the track in safety. Under these circumstances we submit that the evidence failed to show the speed of the car to have been the proximate cause of the accident.

Of course it is elementary that before a person can recover damages by reason of the negligent act of another it must be established that such negligent act was the proximate cause of the in-

juries sustained. In other words, that had defendant not been negligent the accident would not have occurred.

> "Liability does not rest in the negligent act but upon proof that the act of negligence was the proximate cause of the injury."
>
> *Wilke v. Logging & Timber Co.,* 55 Wash. 324.

The mere fact that a street car is running in excess of the rate permitted by ordinance will not entitle an injured party to go to the jury on the question of negligence, when there is no evidence showing that the motorman could have avoided the injury if the speed had been within the permitted rate.

Molyneux v. Ry. Co., 81 Mo. App. 25;

Detmers v. R. Co., 48 N. Y. S. 23;

Hoffman v. Ry. Co., 63 N. Y. S. 442;

Holdredge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109;

Hirschman v. R. Co., 61 N. Y. S. 304;

Callery v. Transit Co., 185 Pa. St. 176, 39 Atl. 813;

Hunter v. Traction Co., 193 Pa. St. 557, 44 Atl. 578;

Miller v. R. Co., 114 La. 409, 38 So. 401;

Louisville Ry. Co. v. Gaar, (Ky.) 112 S. W. 1130;

McCann v. R. Co., 3 N. Y. S. 418;

Schmidt v. Transit Co., 140 Mo. App. 182, 120 S. W. 96;

Foreman v. Norfolk, etc., Co., 106 Va. 770, 56 S. E. 805.

In *Schmidt v. Transit Co.,* 140 Mo. App. 182, 120 S. W. 96, the court said:

"It is argued the court should have instructed a verdict for the defendant, for the reason there was no evidence tending to show that the excessive speed of the car was the proximate cause of the collision and resulted in the injury to plaintiff. It is very true that the mere fact a street car is run at a greater rate of speed than is allowed by the ordinance will not authorize a recovery, unless there is some evidence connecting a violation of the ordinance with the injury complained of. That is to say, the mere fact of excessive speed, without more, is not sufficient to support an action. A right of action, therefore, accrues to a person only when it appears that such excessive speed operates proximately to his injury. Therefore, in order to support the action, it should appear that the injury would not have occurred if the car were running at a speed within the ordinance limit. There is no presumption of law

that, because the car was running in violation of the ordinance, the plaintiff's injury resulted proximately therefrom. On the contrary, such is a matter of fact, which must be established to a reasonable certainty by the evidence. *Bluedorn v. Mo. Pac. Ry. Co.,* 121 Mo. 258, 25 S. W. 943; *Kelly v. Han. & St. J. Ry. Co.,* 75 Mo. 138; *Jackson v. Ry. Co.,* 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; *Molyneux v. S. W. Mo. Elec. Ry. Co.,* 81 Mo. App. 25."

The case of *Thompson v. R. Co.,* 152 Ind. 461, 53 N. E. 462, is in point. There it appeared that plaintiff was employed by a street railway company to turn switches at the intersection of several lines, and there was room for him to stand safely between the tracks. Having turned the switch a car passed him immediately followed by another drawn by horses which were prancing about, and to avoid injury therefrom the plaintiff stepped back toward the other track and was struck by a car thereon moving in an opposite direction at eight or ten miles an hour, contrary to an ordinance limiting the speed to six miles an hour. Upon this state of facts it was held that it was the appearance of the horses and not the speed of the car that was the proximate cause of the accident. In so holding the court said:

"It is evident, we think, that the proximate cause of the accident and injury to the appellant was the threatening appearance of the horses draiwng the car on the south track. His alarm

from this circumstance led him to step backward towards the north track, and too near it for his safety. The conditions affecting his security at that place were just such as they had been during the whole period of his employment. In a moment of confusion and excitement he miscalculated the space occupied by moving cars on the north track, and he was struck by the front part of a trailer car. Had it not been for the presence, the fright, and the plunging of the horses, no accident would have occurred. *Kistner v. City of Indianapolis,* 100 Ind. 210; *Pennsylvania Co. v. Congdon,* 134 Ind. 226, 33 N. E. 795. See note to *Gilson v. Canal Co.* (Vt.) 36 Am. St. Rep. 807, 861 (s. c. 26 Atl. 70); *O'Neal v. Railway Co.,* 132 Ind. 110, 31 N. E. 669. The danger of such an occurrence was one of the risks of the employment, and was assumed by the appellant. Id.; *Pennsylvania Co. v. O'Shaughnessy,* 122 Ind. 558, 23 N. E. 675."

* * * * * *

"If is were assumed by us, without proof, that the appellee, the Citizen's Street-Railroad Company, was in existence in 1864, when the ordinance was adopted, and that it was one of the 'certain passenger railways' referred to in the ordinance, and subject to its provisions, the fact that the trailer car was moving at a greater rate of speed than 6 miles per hour at the time of the accident would not sustain the

appellant's case. No casual connection is shown between the speed of the car which struck the appellant and the injury. *Had the car been moving at the rate of 6 miles per hour, instead of 8 or 10, and had appellant stepped backward as he did, at the instant he did, to get out of the way of the horses, he would have been struck by the passing car, not because of its rate of speed, but on account of his position near the track.*"

The only difference between the case at bar and the case last cited is that in the present case plaintiff involuntarily stepped upon the track by reason of the teetering of the board on which he was standing while in the *Thompson case* he involuntarily, or in a moment of confusion, stepped upon the track by reason of the prancing of the horses of a car passing upon a parallel track.

The speed of the car, we submit, was not the proximate cause of the plaintiff's injuries.

Failure to Sound Gong Not the Proximate Cause of Accident

The burden was upon the plaintiff to establish negligence on the part of defendant. It was not shown that any of the people working at the point where plaintiff was injured had any occasion to cross, stand upon, or get dangerously near the track. On the other hand it affirmatively appears that plaintiff did not have to cross the track for material.

(Record, pp. 140-1). It is undisputed that as the car approached the place where plaintiff was working neither the mason in the excavation nor plaintiff were dangerously near the track. Plaintiff was standing on the north side of the hole and therefore, in handing brick to the mason in the hole, *must have been facing the car which was approaching from the south.* We submit that under such circumstances the motorman of the approaching car was not called upon, as a reasonably prudent man, to anticipate that plaintiff, without glancing up the track, would suddenly jump upon the track immediately in front of the car.

There is no obligation resting upon a motorman to sound the gong unless some extraordinary exigency requires it.

> *Theobold v. Transit Co.,* 191 Mo. 395, 90 S. W. 354;
>
> *Perry v. St. R. Co.,* 101 Ga. 400, 29 S. E. 304;
>
> *Miller v. Traction Co.,* 198 Pa. St. 659, 48 Atl. 864.

In *Eddy v. Ry. Co.,* 98 Ia. 626, 67 N. W. 676, the Court said:

> "We incline to think he (the motorman) was not chargeable with negligence in assuming that a laborer on the street, who was not so near to the track as to be in danger of being

> struck by the car, would require a signal to keep him from putting himself in a place of danger."

Moreover, the evidence is conclusive that plaintiff's act in jumping upon the track in front of the approaching car was involuntary, resulting from his stepping upon a teetering plank. This being true, he would have jumped just the same had the gong been sounded, and had he known that the car was approaching. It was the slipping of the plank, then, and not the failure of the motorman to sound the gong that was the proximate cause of plaintiff's injuries.

In the case of *Foreman v. Norfolk etc. Co.,* 106 Va. 770, 56 S. E. 805, 806, the court said:

> "If it be conceded that the car which struck the plaintiff was being operated at an unusual rate of speed and without sounding its gong, it is manifest from the uncontradicted evidence in the case, including the admissions of the plaintiff, that this was not the proximate cause of the accident. *Atlantic & D. R. Co. v. Reiger,* 85 Va. 418, 28 S. E. 590.
>
> "The time limit prescribed by the ordinance of Portsmouth was six miles per hour. *The plaintiff says he stepped in front of the car when it was within four or five feet of him. The evidence shows that a car running at the rate of six miles an hour could not be stopped in less than 14½ feet. It is clear, therefore,*

that the plaintiff could not have been saved if the car had been running at the rate prescribed by the ordinance, nor could the sounding of the gong under such circumstances have altered the inevitable result of the plaintiff's act."

On the other hand—

If plaintiff stepped on the track voluntarily he was guilty of contributory negligence.

Plaintiff was in a place of safety until the car was within ten feet of him. The car had been visible to plaintiff for at least three blocks. He knew that cars passed frequently upon these tracks. It was broad daylight. His work of tending the mason in the manhole was the very simplest and could not have so diverted his attention that he could not have glanced in the direction from which the car was approaching before stepping upon the track. In performing his work he was facing the approaching car and had but to raise his eyes to get a sweeping view of the track for three blocks. If, therefore, plaintiff's act in stepping upon the track was a voluntary act he was clearly guilty of contributory negligence barring his recovery in this action.

The case of *Kicly v. The Seattle Electric Company,* 139 Pac. 197, 36 Wash. Decisions (Advance Sheets) 347, is squarely in point. In that case it appeared that the manhole was between the two parallel tracks and the plaintiff and another man were dragging the sewer, one man being down in the manhole and the plaintiff standing at the sur-

face of the street talking to him. The plaintiff was standing in a place of danger and jumped just before the car struck him, but instead of jumping off the track, he jumped directly in front of the car and was struck. The Supreme Court reversed the lower court in permitting the case to be submitted to the jury, holding that the plaintiff was guilty of such contributory negligence as to bar his recovery and therefore directed that the cause be dismissed. We quote the following from the court's opinion:

> "The evidence shows that shortly before he was struck, respondent was leaning over the southerly manhole talking to Shrewbury, who was about to come to the surface for the purpose of obtaining a piece of timber needed in his work. The evidence further shows, that 15th avenue west extended in a northerly and southerly direction; that the car which struck respondent was traveling south; that, when approaching, it could be seen for a distance of almost half a mile before it reached the point where respondent was injured; that the street was clear from obstructions, further than the mere suggestion of another car that had just passed in an opposite direction; that Shrewbury and respondent had removed the coverings from the manholes, and had placed a flag at each of them as a warning; that the manholes were about three hundred feet apart; that respondent was near the southerly man-

hole, and that no one other than persons on the car observed him until just about the moment he was struck. The evidence of a number of passengers produced by appellant, and other witnesses produced by respondent, was that, a repeating gong upon the car was sounded and continued ringing for a distance of from 75 to 200 feet before it reached respondent. The evidence upon this point, which is without practical dispute, is so overwhelming that it disposes of any contention of negligence by reason of appellant's failure to give a warning of the approaching car. Evidence as to the speed was conflicting; some witnesses testifying that the car was running as rapidly as 25 miles per hour, while others testified that it was not running to exceed six or eight miles per hour."

* * * * * * * *

"The speed of the car was doubtless a question for the jury, and upon this issue it is possible they might have been justified in finding that it was running at an excessive and dangerous rate."

* * * * * * * *

"The principal questions in this case are, (1) whether respondent was guilty of contributory negligence; and (2) whether the doctrine of last clear chance can be applied. Respondent had been engaged in the same work for the city for a number of years, and had

been working in this identical locality for about two weeks. The accident occurred in daylight. The street was straight, with a slight descending grade towards the south, and the southbound car which struck respondent, when approaching, could have been seen for at least half a mile. There was nothing upon the street to distract respondent, to confuse him, or to divert his attention; nor was there any evidence that he was deficient in any natural sense, such as sight or hearing. Although he was rightfully upon the street engaged in his usual work, it is difficult to understand how, in the exercise of ordinary care and prudence, he could have failed to see or hear the approaching car. As a witness in his own behalf, he seemed unable to give any intelligent account of how the accident happened. The evidence of other witnesses indicates that he was paying no attention to the approaching car. If he was conscious of its approach, he certainly exercised no care in stepping from the zone of danger; an act which would have required but an instant of time. Two, or at most three, ordinary steps would have placed him in a position of safety. Under these facts, we fail to see how the respondent is to be relieved from the charge of contributory negligence."

* * * * * * * *

"Although respondent was rightfully in the street, it was his duty to exercise reasonable

care to learn of the approach of cars; a turn of the head and a glance of the eye would have been sufficient, especially when a signal was given by the ringing of a repeating gong. *The manhole at which respondent was standing was between appellant's east and west tracks. Respondent was required to take only one or two steps towards the easterly track upon which no car was approaching; an act requiring but an instant of time. It is impossible to see how he could have failed to remove himself from the zone of danger in the face of the approaching car, even though it was running at an excessive speed, without being guilty of contributory negligence as a matter of law.* Although the facts involved may not be entirely similar, the rule announced in *Duteau v. Seattle Elec. Co.,* 45 Wash. 418, 88 Pac. 755; *Skinner v. Tacoma R. & Power Co.,* 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.,* 56 Wash. 278, 105 Pac. 458, and *Fluhart v. Seattle Elec. Co.,* 65 Wash. 291, 118 Pac. 51, is controlling here. Other cases in point are *Hafner v. St. Paul City R. Co.,* 73 Minn. 252, 75 N. W. 1048; *Lyons v. Bay Cities Consol. R. Co.,* 115 Mich. 114, 73 N. W. 139; *Quinn v. Boston Elev. R. Co.,* 188 Mass. 473, 74 N. E. 687. In each of these cases the injured party was working in the street where the car was running, in some instances being employed by the city."

In the *Kiely case* there was evidence that the car was going twenty-five miles an hour. The plaintiff in that case was standing over a manhole between the two tracks, and was in a place of danger as the car approached him. In the present case there was no evidence that the car was going in excess of fifteen miles an hour, and it affirmatively appeared that plaintiff was beyond the sphere of danger as the car approached him, and that he would not have been struck had he not jumped directly in front of the car when it was not to exceed ten feet from him.

The decisions of other courts are to the same effect. Thus in *Clancy v. Transit Co.*, 192 Mo. 615, 91 S. W. 509, a laborer, who was at work on a street between double tracks and while standing in a ditch dug for gas pipes, was struck by a street car, was held guilty of contributory negligence as a matter of law.

In *Brockschmidt v. R. Co.,* 205 Mo. 435, 103 S. W. 964, it was held that a laborer who, knowing that cars frequently passed along tracks of a street railway, took a position in the path of the cars with his back to those which would approach him, for the purpose of removing dirt from the tracks, and remained there without care for approaching cars until he was struck and killed, was held to have been guilty of contributory negligence barring a recovery, although no gong was sounded.

In *Hafner v. St. Paul City R. Co.*, 73 Minn. 252, 75 N. W. 1048, it appeared that plaintiff, who had been engaged for three days in grading a street, had gone to a pile of plank to get one to assist in getting a load of sand up an abrupt ascent. He looked for a car when at the pile, which was 48 feet from the place where the plank was to be used. Seeing none approaching, he went to the place where the plank was to be used and stooped to adjust the plank without looking to see if a car was near, thereby throwing his head into a position where it was struck by a passing car. It was held that he was guilty of contributory negligence barring a recovery.

In *Davies v. Peoples R. Co.*, 159 Mo. 1, 59 S. W. 982, a person unloading iron beams from a wagon standing in a street at a sufficient distance to allow cars to pass, who was compelled to go within range of cars to unload, was held guilty of contributory negligence where he had moved for other cars, and while standing with his back to an approaching car which he had not seen, was struck and injured.

In *Volosko v. Interurban St. R. Co.*, 190 N. Y. 206, 82 N. E. 1090, plaintiff was held guilty of contributory negligence where he was unloading blocks of marble from a wagon standing so that the hub was five of six inches from the track, which he knew was there, and a view of which was unobstructed for 300 feet, and he looked in neither

direction before stepping on the hub of the wagon, where he worked five or ten minutes before being struck.

In *Lyons v. R. Co.,* 115 Mich. 114, 73 N. W. 139, a city laborer sweeping between the rails, who was so deaf that he could not hear the gong or sound of the car, but knew that cars were passing every few minutes, was held guilty of contributory negligence in failing to look, where the car striking him was in sight for a considerable distance. It was further held that his deafness required the exercise of greater diligence on his part to use his sight.

The case of *Quinn v. Boston Elevated R. Co.,* 188 Mass. 473, 74 N. E. 681, was quoted with approval in the case of *Hellieson v. S. E. Co.,* 56 Wash. 278. There the plaintiff was held not to have exercised due care where, while engaged in repairing a bridge between a sidewalk and the outer rail of the defendant's road, when near the track marking a plank, he was struck in the face by a car which he might have seen if he had looked.

In *Eddy v. Cedar Rapids & M. City R. Co.,* 98 Iowa 626, 67 N. W. 676, the plaintiff, who was in the employ of the city repairing walks along the side of defendant's tracks, had placed a plank over cross pieces to ascertain if they were properly placed, and while leaning over examining them, was injured through jumping just before the collision by a car from the rear striking the end of the plank. He knew that cars were passing at

short intervals. Recovery was held to be barred by his contributory negligence, though the motorman gave no signal of the car's approach.

In *Kelly v. Elevated R. Co.,* 197 Mass. 420, 83 N. E. 865, it was held that one whose work in a street did not bring him within striking distance of passing cars, and who nevertheless, at a place where the track was straight and the view unobstructed for over 250 feet, without thinking of the car, went near enough to be hit while his back was turned, did not exercise due care for his safety so as to entitle him to recover for a resulting injury.

In *Stenzhorn v. City Elec. Ry. Co.,* 159 Mich. 82, 123 N. W. 621, it was held that where, notwithstanding the noise in the street from passing vehicles, etc., plaintiff, a street sweeper, worked on the track of a street railway in such a position that he could not see cars approaching from the rear, and relied solely on his sense of hearing for safety, he was guilty of negligence precluding a recovery for injuries sustained in a collision with a car approaching from that direction.

In *Manetta v. United Traction Co.,* 174 Fed. 207, it was held that the plaintiff who was in charge of street work was guilty of contributory negligence as a matter of law, in standing upon street car tracks, at a corner where the track turned, for from 15 to 25 minutes with his back toward the point from which the car approached which struck him, without looking around.

In *Harlan v. Street Ry. Co.,* 157 Mo. App. 623, 138 S. W. 677, it was held that a street sweeper who started to cross the street car track in the course of his work, without looking for a car, and having stepped directly in front of one was guilty of such contributory negligence as to bar recovery for his death, even though the duty was imposed upon the street car company to furnish a watchman at the point in question and "notwithstanding the watchman may have been amiss in his duty to warn deceased of the approach of the car, and the gripman alike amiss in not giving the danger signal."

The evidence, we submit, fails to show that defendant was guilty of any actionable negligence, since, whatever, the speed of the car, it was not the proximate cause of the accident, and it was neither shown that the motorman owed the duty to plaintiff of sounding the gong as the car approached the manhole, nor that the failure to sound the gong was the proximate cause of the accident. On the other hand, the evidence affirmatively shows that if plaintiff voluntarily sprang upon the track in front of the car he was guilty of such contributory negligence as to bar his recovery. Whether plaintiff's act in jumping on the track was voluntary or involuntary, it follows that the court erred in refusing to direct a verdict in favor of defendant.

Plaintiff Can Recover Only Under Workingmen's Compensation Act

Section 1 of the Workingmen's Compensation Act declares that *all phases* of injuries to workmen engaged in hazardous work are withdrawn from private controversy to the exclusion of every other remedy, proceeding or compensation regardless of questions of fault and that all civil actions and causes of action for such personal injuries are abolished except as in the act provided.

Rem. & Bal. Code, Supp. 1913, Sec. 6604-1.

Section 2 includes water works within the term "extra hazardous" employments as used in the Act.

Rem. & Bal. Code, Supp. 1913, Sec. 6604-2.

Section 3 provides:

> "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 6604-4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death re-

sult from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund."

Rem. & Bal. Code, Supp. 1913, Sec. 6604-3.

Section 5 provides:

"Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, *such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.*"

Rem. & Bal. Code, Supp. 1913, Sec. 6604-5.

It is apparent from the portions of the Workmen's Compensation Act above quoted that this Act contemplates that where an employee is injured at the plant of the employer when engaged in one of the employments enumerated as extra hazardous, whether through the negligence of his employer or a third person, the injured employee had no right to elect but could recover only under the Com-

pensation Act, and whatsoever right of action he had against a third person causing his injury would be assigned to the state by operation of law.

The record shows beyond question that plaintiff at the time of his injury was working in connection with the water works owned and operated by the City of Seattle. Paragraph II of the complaint alleges that the excavation in connection with which plaintiff was working at the time of his injuries was "made by the city for the purpose of constructing therein a water gate in connection with the underground water pipe then forming a part of its water system." (Record, p. 2). Paragraph III alleges that the plaintiff was then in the employ of contractors of the city and was engaged in assisting in the building of a manhole. (Record, p. 3).

Defendant's answer alleges as a second affirmative defense that the plaintiff at the time of his injuries was employed by a contractor of the City of Seattle in the performance of extra hazardous work, namely the construction of a manhole within the terms of the Workmen's Compensation Act. (Record, pp. 9-10). This portion of the answer was put in issue by the reply. (Record, p. 13).

As bearing upon the question of the character of work performed by plaintiff at the time of his injuries, we wish to call attention to the testimony of some of the witnesses. Plaintiff testified that at the time of his injury he was working for Krogh and Jesson, whose general business was "contract-

ing, street work;" (Record, p. 54) that at the time of his injury he was assisting in putting an air shaft or manhole which was a part and parcel of the city water works and was connected with one of the city water mains. (Record, p. 71).

Mr. Krogh of Krogh and Jesson, a firm of contractors for whom plaintiff was working at the time of his injury, testified that this firm was working under a contract from the city and that plaintiff was in their employ and on their payroll. (Record, p. 136).

It is conceded then that plaintiff at the time of his injury was engaged in assisting in the construction of a manhole which was a part and parcel of and a physical connection with the water pipes forming a part of the waterworks system of the city of Seattle. Was plaintiff at the time of his injuries working at the "plant" of his employer? We submit that he was.

A "plant" is defined by Funk & Wagnalls New Standard Dictionary as follows: "A set of machines, tools, etc., necessary to conduct a mechanical business: often including the buildings and grounds, or, in case of a railroad, the rolling-stock, but not including material or product; hence the permanent appliances needed for any institution, as a post-office, a college, etc."

The Century Dictionary defines the word "plant" as, "the fixtures, machinery, tools, apparatus, ap-

pliances, etc., necessary to carry on any trade or mechanical business or any mechanical operation or process."

In *Yarmouth v. France,* 19 Q. B. D. 647, at page 658, Justice Lindley says that the word plant in its ordinary sense "includes whatever apparatus is used by a business man in carrying on his business * * * all goods and chattels fixed or movable, alive or dead, which he keeps for permanent employment in his business."

In the case of *Sloss-Sheffield Steel & Iron Co. v. Mobley,* 193 Ala. 425, 36 So. 181, 184, the court said:

> "The doctrine of general acceptance in other jurisdictions is that the statute term 'plant' comprises whatever apparatus, fixtures, or tools a master uses in his business. Dresser's Employers' Liability, Sec. 48. Thus it had been adjudged in England and Scotland that a horse used in the business of the master is 'plant' and that viciousness of disposition is a 'defect in the condition' of such plant. In the English case the court said: ' "Plant," in its ordinary sense, includes whatever apparatus is used by a business man for carrying on his business; not his stock in trade, which he buys or makes for sale, but all goods or chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business.' *Yarmouth v. France,* 19 Q. B. Div. 647; s. c. Eng. Ruling

> Cas. 217; *Houston v. Edinburg St. Tramways Co.,* 14 Rettie, Ct. Sess. Cas. 621. The Supreme Court of Georgia defines 'plant' as meaning fixtures and tools necessary to carry on any trade or mechanical business. *Liberty County L. & L. Co. v. Barnes,* 77 Ga. 748, 1 S. E. 378. 'Small tools and appliances,' says Mr. Dresser, 'are included within its meaning,' instancing ladders, and citing *Weblin v. Ballard,* 13 Q. B. Div. 122, and *Cripps v. Judge,* 13 Q. B. Div. 583."

The Employers' Liability Act of Indiana provides that every railroad or other corporation shall be liable for damages for personal injuries suffered by any employee while in its services when such injury is suffered by reason of any defect in the condition of the ways, works, *plant,* tools, and machinery connected with or in use in the business of such corporation. The supreme court of that state in an action in which an employee of the telephone company was injured by the breaking of a telephone pole said:

> "Probably a telegraph pole in such a case may properly be regarded as coming within the meaning of the word 'plant' in the first clause of the statute."
>
> *Cleveland, C., C. & St. L. Ry. Co. v. Scott,* 29 Ind. A. 519, 64 N. E. 896.

In the case of *Brennan v. Sewerage and Water Board,* 108 La. 569, 32 So. 563, 568, it appeared

that certain taxpayers sought an injunction to prohibit the consummation of a contract entered into between the defendant and a New Orleans sewer company whereby the defendant had undertaken to acquire for the city certain tangible property and franchises of which the company claimed to be the owner acting under an amendment to the constitution authorizing defendant to use the proceeds of a certain tax in acquiring "the plant and franchises of any water or sewerage companies in the city of New Orleans." The court held that under this provision of the constitution the defendant would have a right to acquire some thousands of feet of constructed sewer not in connection with any machinery or other apparatus, and in so holding said:

> "It is said that the language of the amendment does not apply to the property of the sewer company, because that property does not constitute a 'plant,' but consists, mainly, of some thousands of feet of constructed sewers not yet connected with any machinery or other apparatus; and we are referred to certain testimony to the effect that the pumping station, with the machinery, pumps, etc., of the waterworks company, are the 'plant' of that company. The conclusion to be drawn from this argument and illustration is that if the building, machinery, pumps, etc., thus referred to should be burned, or otherwise destroyed, the waterworks company would be without a 'plant,'

> or other property, that the sewerage and water board would be authorized to buy. We do not concur in this view, and we should, probably, be doing injustice to the witnesses by so interpreting their testimony. A building to which engines and pumps are established for the distribution of water, but from which are no pipes or conduits leading, may be called a waterworks plant, and a system of pipes intended for the distribution of water, but with no provision by which that distribution can be made, may, with equal propriety be so called; and in neither case would the misnomer be more serious than if we should call an animal, otherwise a horse, by that name, though he should come into the world with but two legs, or should lose all of his legs after his arrival."

Plaintiff was injured in connection with one of the extra hazardous employments contemplated by the Workmen's Compensation Act, namely work connected with the construction of waterworks, and was injured in the course of his employment at the plant of his employer. Such being the case he could look only to the Employer's Compensation Act for compensation for his injuries and was not entitled to recover in this action.

We are aware that this court in the case of *Meese v. R. Co.,* 211 Fed. 254, held that the Washington Workmen's Compensation Act did not deprive the widow and children from recovering for

the wrongful death of an injured workman caused by the negligence of a third party, but that case was decided upon the theory that neither the title nor the body of the act was broad enough to repeal, either expressly or by implication, Remington & Ballinger's Code, §§ 183, 194, cretaing an action for wrongful death. Your Honors held in that case that since the act expressly repealed certain specific acts, it must be presumed that it was not intended to repeal others not specified such as the statute allowing recovery for wrongful death.

While this might be true as to a right of action given by a statute which was not expressly repealed by the Workmen's Compensation Act, the reasoning does not apply to actions for personal injuries to a workman injured by the act of a third person, since his right of recovery existed at common law and Section 1 expressly abolishes the common law right of action to workmen injured in extra hazardous work. There is no limitation in either the title or in the act as to the *manner* of the injury, whether by the act of the employer or the act of a third person. The act clearly contemplates that it was intended that an employee should be entitled to recover for any injury he sustained in the course of his employment at the plant whoever was responsible for such injury.

In the recent case of *Wendt v. Industrial Insurance Commission,* 38 Washington De-

cisions 94 (Advance Sheets), 141 Pacif. ...., the Supreme Court of the State of Washington held that where a carpenter while in the course of his employment was killed while turning on an electric current for the purpose of putting in motion a power driven grind stone, his widow and children were entitled to recover under the Workmen's Compensation Act, even though it appeared that the workman was killed as a result of the act of a person other than his employer, which resulted in an electric current of high voltage passing through his body. In so holding, the Court said:

> "It being shown that the deceased, at the time of his injury, was employed in a 'workshop where machinery is used;' that the workshop was a place 'wherein power-driven machinery is employed and manual labor is exercised * * * over which place the employer of the person working therein has the right of access or control,' and that he was injured 'upon the premises,' it seems to us there is no escape from the conclusion that his injury is within the purview of the act."

There are many employments that are hazardous more by reason of likely injury at the hands of persons other than the employer than from the acts of the employer himself. Where a lineman working for a telephone company is injured by wires of his employer being negligently caused to come in contact with a high tension wire of other com-

panies through the act of a third party, it can hardly be said that it was not the intent of the Compensation Act that such injured workman would be entitled to compensation under the act. Where a trainman is injured by the wrongful act of a third party in placing an obstruction upon the track, could it for a moment be suggested that it was the intention of the Compensation Act that such trainman should not be compensated for his injuries? If the title of the act is broad enough to allow a recovery by a workman injured by the act of a person other than his employer, it is clearly broad enough to take away from the injured workman the right to recover from such third party for his injury. An examination of the title and body of the act shows, we contend, that the test as to the right of recovery is not, who or what, caused the injury, but the test is rather, was the workman at the time of his injury engaged in the employment of his employer. We respectfully submit that plaintiff is not entitled to recover against defendant in this action.

SPECIFICATION OF ERROR NO. III

The court instructed the jury as follows:

> "You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial

> Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. You are instructed that under the evidence as it is presented before you in this case, that the Act does not apply to the issue before you for consideration, and that you will entirely disregard such defense on the part of the defendant, and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant or the contributory negligence on the part of the plaintiff as outlined and defined in these instructions." (Record, pp. 205-6).

In giving the above instruction we respectfully submit the court erred. In discussing Specifications of Error, One and Two, (pp. 37 to 47 *ante*), we have shown that if at the time of his injury plaintiff was working "at the plant" of his employer, he could recover only under the Workingmen's Compensation Act, and had no right of action against defendant. If, on the other hand, plaintiff's injury occurred away from the plant of his employer his rights against defendant are controlled by the following provision of the act:

> "If the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect

whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund."

Laws of Washington, of 1911, p. 348, Sec. 3; Rem. & Bal. Code, Sec. 6604-3.

Upon the issue as to whether or not plaintiff had, prior to the beginning of this suit, elected to take under the Compensation Act, the evidence was, in substance, as follows:

The accident in question occurred January 23, 1913. (Record, pp. 2, 54). On January 25, 1913, plaintiff presented his claim to the State under the Workingmen's Compensation Act over his own signature. (Record, pp. 78-79). And as a result of said claim being presented two state warrants for $30 each were delivered to plaintiff and at the time of the trial (January 9, 1914, Record, p. 14) nearly a year after the claim was presented by plaintiff, thesee warrants had not yet been returned by the plaintiff to the Industrial Insurance Commission (Record, pp. 79-80) although the Commission had requested him so to do. (Record, p. 85).

This evidence, we submit, if it did not conclusively establish that plaintiff had elected to take under the Workingmen's Compensation Act, was at least sufficient to present a jury question as to whether or not he had made such an election.

The case is in every way analogous to the customary contract whereby an employee agrees, on becoming a member of his employer's relief association, that the acceptance of relief therefrom, on being injured, shall bar his right of action against his employer for the injury. Where such private agreements are made it is uniformly held:

> "The acceptance of benefits under such a contract bars an action for damages."
>
> 26 Cyc. 1096, and cases cited.

In other words, the acceptance of benefits constitutes the election as to which remedy the injured party wishes to pursue.

Did plaintiff accept any "benefits" under the Compensation Act? This depends upon whether the warrants sent to, and received by, plaintiff from the State as a result of the claim presented by him, constituted a payment by the State to plaintiff of the amounts represented by said warrants. This, we submit, was clearly a question for the jury. The fact that plaintiff kept these warrants for nearly a year after receiving them was sufficient evidence to support a finding that they were to be treated as payment.

The following excerpt from the case of *Western Pac. Land Co. v. Wilson,* 19 Cal. App. 338, 125 Pac. 1076, 1078, is in point:

> "This instruction in effect directed the jury to disregard all evidence concerning the check.

But it was the giving of this check by defendant, and its subsequent retention by plaintiff, that defendant claimed amounted to a payment. The court determined, as a matter of law, that the giving and retention of the check, under the circumstances disclosed by the evidence, did not amount to a payment. In this we think that the court erred, and the instruction as given was erroneous, and not a correct charge as a matter of law. The check was given and offered as payment. The plaintiff retained the check, without expressly refusing it, for about one month, and until after the bank had closed its doors as insolvent. Under such circumstances, we think it should have been left to the jury to determine, under proper instructions from the court, whether or not the giving and retention of the check had the effect of payment.

"Where a check is given as payment, unless it be refused, it is the duty of the creditor to return it; an unreasonable delay in returning a check may make it equal to payment. Conde *v. Dreisam Gold M. Co.,* 3 Cal. App. 583, 589, 86 Pac. 825. Whether or not plaintiff in this case had kept the check for an unreasonable time was a question for the jury to determine, and was not a matter that should have been determined, as a matter of law, by the court. The fact that the check was not returned, or offered to be returned, until after the failure of

> the bank is significant, and may account for this litigation."

Whether a check was accepted as an absolute or conditional payment is one for the jury.

> 30 Cyc. 1295-6.

Considering that plaintiff retained these two warrants delivered to him as a partial adjustment of his claim he presented to the State for nearly a year and after he had received a letter from the Industrial Insurance Commission asking that they be returned (Record, p. 85) we submit that the question of whether plaintiff had elected to take under the Compensation Act should have been submitted to the jury, and that the court consequently erred in withdrawing the issue in question from their consideration.

SPECIFICATION OF ERROR NO. IV

Defendant requested the court to give the following instruction, which was refused:

> "You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute con-

tributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the look-out and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant." (Record p. 203).

It is true that the Supreme Court of the State of Washington has frequently held that it is not always negligence as a matter of law for a person crossing a street railway track to fail to look and listen for approaching cars, but even those courts which hold that the stop, look and listen rule does not apply to persons crossing a street car track, have held that under some circumstances failure to so look and listen is negligence as a matter of law. The rule is well stated in *Denis v. St. Ry. Co.,* 104 Me. 39, 70 Atl. 1047, where the court said:

> "It is true that the established rule respecting steam railroads, that it is negligence *per se* for a person to cross the track without first looking and listening for a coming train, has been repeatedly held by this court to be inapplicable to the crossing of the tracks of a street railway in a public street where the cars do not enjoy the exclusive right of way. It can-

not be declared as a matter of law that it is negligence *per se* for a traveler to cross the tracks of a street railway without first looking and listening for an approaching car. But, before crossing a street railway, the traveler is required to exercise all reasonable and ordinary care, prudence, and vigilence to avoid a collision with a street car, and, in exercising this degree of care, *he may be required as a matter of fact in many situations to look and listen for an approaching car before attempting to cross the track.* He must do for his own safety and for the safety of the passengers in the car what ordinarily, careful, thoughtful, and prudent persons are accustomed to do under like circumstances. Whether his failure to look and listen before crossing is to be deemed negligence must be determined upon all the facts and circumstances disclosed by the evidence. *Fairbanks v. Railway Co.,* 95 Me., 78, 49 Atl. 421; *Warren v. Railway Co.,* 95 Me. 115, 49 Atl. 609; *Butler v. Street Railway,* 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; *Marden v. Street Railway,* 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476."

In accordance with the foregoing rule, this court has held in numerous cases that under the peculiar circumstances appearing it was negligence *per se* for the plaintiff to fail to look and listen before crossing a street railway track.

Mey v. Seattle Elec. Co., 47 Wash. 497;

Skinner v. Tacoma R. & P. Co., 46 Wash. 126;

Helleison v. Seattle Elec. Co., 56 Wash 278;

Fluhart v. Seattle Elec. Co., 65 Wash. 291;

Steuding v. Seattle Elec Co., 71 Wash. 476;

Bardshar v. Seattle Elec. Co., 72 Wash. 200;

Beeman v. P. S. T., L & P. Co., 37 Wash. Dec. (Advance Sheets) 107, 139 Pac. 1087;

Kiely v. Seattle Elec. Co., 36 Wash. Dec. (Advance Sheets) 347, 139 Pac. 197.

What were the peculiar circumstances of the case at bar? Plaintiff had been working at this same kind of work for several months. He knew that cars frequently passed upon these tracks. He knew that there was nothing in the character of his work that demanded that he cross the tracks. His work was simple and in doing his work he was standing in a place of safety facing the approaching car. There were no noises to distract his attention. It was broad daylight and the approaching car could have been seen for 600 feet had he looked. Whether the gong was sounded or not the car must have made considerable noise as it approached the plaintiff.

Riedel v. Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 826;

Quinn v. R. Co., 57 N. Y. Supp. 544, 546.

There was nothing to interfere with plaintiff's hearing the car had he listened; nothing to prevent his seeing the car had he looked. One is at a loss to understand how an individual could exercise any care whatever under such circumstances to learn of a car's approach unless he used his senses of hearing and sight for that purpose. In the Kiely case, above cited, the facts were substantially the same as in the case at bar, except that there the manhole was constructed between the tracks and that there the plaintiff, as the car approached, was standing, not in a place of safety, but upon the track upon which the car was approaching, looking down into the manhole where another man was working, and under such circumstances it was held that the plaintiff in failing to look or listen for the approaching car, which he must have seen or heard had he looked or listened, was guilty of contributory negligence as a matter of law.

We respectfully submit that under the peculiar circumstances of this case it was the duty of plaintiff before stepping upon the track to look and listen for cars which he knew ran frequently upon the track, and therefore might be expected at any moment, and that the court erred in refusing to give the instruction requested.

SPECIFICATION OF ERROR NO. V

The court instructed the jury as follows:

> "You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened." (Record, p. 206).

The effect of this instruction was to tell the jury that if they found that the car which injured plaintiff was traveling more than twelve miles an hour, the burden was then cast upon defendant to establish contributory negligence, and that if defendant failed to establish contributory negligence plaintiff was entitled to recover. This was not the law applicable to the facts. The burden was not cast upon defendant to establish contributory negligence until the jury had not only found that the car was traveling at an unlawful speed, but *that such excessive speed was a proximate cause of plaintiff's injury.* The instruction was very misleading on this account if for no other reason, since it relieved

plaintiff of the necessity of proving one of the vital elements of actionable negligence, namely, that such negligence *caused* the injury complained of.

It is prejudicial error to give an instruction making defendant liable if he was negligent unless plaintiff was guilty of contributory negligence *as ignoring the necessity that the negligence proximately caused the injury.*

Washington etc., Ry. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035;

Maitland v. Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124;

Gulf etc. Ry. Co. v. Williams, (Tex.) 39 S. W. 967;

Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. 573;

Avery & Sons v. Meek, 96 Ky. 192, 28 S. W. 337.

The instruction complained of is subject to even a more serious objection. It will be observed that by it, His Honor below submitted to the jury the issue of the alleged negligence on the part of defendant in operating its car at an excessive or unlawful speed. On pages 19 to 24 *ante,* we have shown that the speed of the car was not the proximate cause of plaintiff's injuries. It was improper and prejudicial to defendant, therefore, for the court to submit to the jury the issue of whether or not

at the time of, or before, the accident, the car was traveling at an excessive speed.

The law is well settled that the giving of instructions in actions for personal injuries, which submit to the jury a ground of negligence not established by the evidence, is reversible error.

Buyken v. Lewis Construction Co., 51 Wash. 627, and cases cited;

Edison Gen. Elec. Co. v. Canadian Pac. Nav. Co., 8 Wash. 370;

Nye v. Kelly, 19 Wash. 73;

Maynard v. O. R. & N. Co., 46 Ore. 15, 78 Pac. 983.

Ill. Cent. R. Co. v. Vinson, (Ky.) 74 S. W. 671, 672;

Lexington R. Co. v. VanLadon's Adm'r., (Ky.) 107 S. W. 740;

St. Louis, etc., R. Co. v. Woodward, 70 Ark. 441, 69 S. W. 55, 56;

Mo. Pac. R. Co. v. Pierce, 33 Kan. 61, 5 Pac. 378;

Ala. & V. Ry. Co. v. Hayne, 76 Miss. 538, 24 So. 907.

Stevens v. Elec. Co., 132 Ia. 597, 109 N. W. 1090, 1092;

Galveston, etc., Ry. Co. v. Sullivan (Tex. Civ. App.) 42 S. W. 568;

Mo. Pac. Ry. Co. v. Platzer, 72 Tex. 117, 11 S. W. 160, 162;

Conklin v. Central N. Y. T. & T. Co., 114 N. Y. Supp. 190, 191;

Rinmann v. Construction Co., 114 Minn. 484, 131 N. W. 478;

New Orleans, etc., R. Co., v. Williams, 96 Miss. 373, 53 So. 619;

Reynolds v. United Rys. Co., 142 Mo. App. 708, 121 S. W. 1093;

Landers v. R. Co., 114 Mo. App. 655, 90 S. W. 117.

The following is quoted from St. Louis, etc. R. Co. v. Woodward, 70 Ark. 441, 69 S. W. 55, 56:

"There is no evidence in the case that the engineer in charge of the engine and moving cars could have done more than he did do to avoid the injury after he saw the ice wagon, and peril of its driver, for after the wagon got in view of the railroad track the train was stopped within from 34 to 80 feet, according to the testimony of the several witnesses, which was a reasonably short stop, even if the train was moving at a low rate of four to six miles an hour, as some of the witnesses testified. The part of the instruction covering the alleged negligence after he saw defendant's perilous situation is not only without evidence to support it, but was calculated to confuse the jury, and di-

vert their minds from the real issue in the case, and was therefore improperly given. *Railway Co. v. Houston,* 95 U. S. 697, 24 L. Ed. 542; *U. S. v. Breiting,* 20 How. 252, 15 L. Ed. 900; *Railroad Co. v. Townsend,* 41 Ark. 382; *Railway Co. v. Hammond,* 58 Ark. 324, 24 S. W. 723. *Under the circumstances it cannot be determined whether the jury based their verdict upon the proper instructions given in the case or upon the erroneous instruction. The instructions, especially in a case like this, where every issue is sharply controverted by the evidence, should be direct, and to the point, and not at all misleading as to the real issues involved; otherwise there can be no fair trial."*

For the reasons urged we respectfully submit that the judgment of the lower court should be reversed and the cause remanded for a new trial.

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